

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte JOHN P. REBHORN, STEPHEN P. BELKO  
and PAMELA A. HODULIK

Appeal No. 2004-1815  
Application No. 09/781,582

ON BRIEF

MAILED

SEP 28 2004

U.S. PATENT AND TRADEMARK OFFICE  
BOARD OF PATENT APPEALS  
AND INTERFERENCES

Before WALTZ, KRATZ and DELMENDO, Administrative Patent Judges.  
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-51, which are all of the claims pending in this application.

BACKGROUND

Appellants' invention relates to a portable, single-use container and method of manufacturing same. An understanding of the invention can be derived from a reading of exemplary claims 1, 35 and 38, which are reproduced below.

1. A portable, single-use container for separately containing a first and a second consumable product [sic], the container comprising:

a first compartment for containing a first consumable product, the first compartment tapering at an upper portion thereof to form a spout forming a passage along a spout internal surface; and

a second compartment for containing a second consumable product, the second compartment tapering at an upper portion thereof to form a mouth forming an opening along a mouth internal surface;

wherein the first and second compartments are assembled to one another in a side-by-side fashion such that the mouth abuts the spout, and further wherein upon final assembly, the spout and mouth are positioned such that each of the respective internal surfaces define an interior section and an exterior section, the exterior section of the spout internal surface having a radius differing from a radius of the exterior section of the mouth internal surface.

35. A portable, single-use packaged good article comprising:

a first compartment;

a first consumable product contained within the first compartment;

a second compartment secured to the first compartment in side-by-side fashion, the first and second compartments combining to define a container body;

a second consumable product contained within the second compartment;

a first compartment opening for dispensing the first consumable product from the first compartment, the first compartment opening having a transverse cross-sectional area less than a maximum transverse cross-sectional area of the first compartment; and

a second compartment opening for dispensing the second consumable product from the second compartment, the second compartment opening having a transverse cross-sectional area less than a maximum transverse cross-sectional area of the second compartment, the

transverse cross-sectional area of the second compartment opening being at least three times greater than the transverse cross-section area of the first compartment opening;

wherein at least one of the first and second compartment openings is substantially centered relative to the container body.

38. A method of manufacturing a portable, single-use container separately containing two consumable products, the method comprising:

providing a first compartment tapering at an upper portion thereof to form a spout;

providing a second compartment tapering at an upper portion thereof to form a mouth, the first and second compartment being configured for assembly to one another in a side-by-side fashion;

dispensing a first consumable product into the first compartment;

covering the spout separate of the mouth with a seal that seals the first consumable product within the first compartment;

dispensing a second consumable product into the second compartment;

assembling the first and second compartments to one another; and

covering the mouth and the seal with a cover;

wherein upon final assembly, the mouth abuts the spout.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Stegath	1,363,064	Dec. 21, 1920
Ward	2,026,449	Dec. 31, 1935
Smith	2,170,311	Aug. 22, 1939
Simmons	4,148,417	Apr. 10, 1979
Ness '561	5,588,561	Dec. 31, 1996
Newarski	5,727,679	Mar. 17, 1998
Binter	5,735,422	Apr. 07, 1998
Ness '289	5,753,289	May 19, 1998

Claims 1, 4-9, 13, 16, 47 and 48 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Stegath. Claims 1-12, 16, 17, 19 and 48 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ness '561. Claims 1-9, 16-18, 47 and 48 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ness '289. Claims 38-40, 42 and 46 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ness '289. Claims 38, 44, 45 and 46 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Simmons as further evidenced by Binter. Claim 15 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Newarski. Claim 14 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Simmons. Claims 19-28, 32-34 and 49 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward and Smith. Claim 29 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward, Smith and Stegath. Claim 30 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward, Smith and Simmons. Claim 31 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward, Smith and Newarski. Claims 35-37, 50 and 51 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289. Claims

41 and 43 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Newarski.

We refer to the brief and reply brief and to the answer for a complete exposition of the opposing viewpoints expressed by appellants and the examiner concerning the issues before us on this appeal.

OPINION

Upon careful review of the respective positions advanced by appellants and the examiner with respect to the rejections that are before us for review, we find ourselves in agreement with appellants' viewpoint in that the examiner has failed to carry the burden of establishing a prima facie case of anticipation or obviousness with respect to the rejections presented except for the § 103(a) rejection of claims 35-37, 50 and 51 over Ness '289. Accordingly, except for that last mentioned rejection, we will not sustain any of the examiner's other rejections. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992); In re Piasecki, 745 F.2d 1468, 1471-1472, 223 USPQ 785, 787-788 (Fed. Cir. 1984). Our reasoning follows.

§ 102(b) Rejection over Simmons

We start with the examiner's anticipation rejection of method claims 38, 44, 45 and 46 over Simmons with Binter being supplied as further evidence as to the disclosure of Simmons.

All of the so rejected method claims require steps of providing first and second compartments, dispensing a first consumable product into the first compartment, covering a spout of the first compartment with a seal, dispensing a second consumable product into the second compartment, assembling the compartments to one another and covering a mouth of the second compartment and the seal of the first compartment with a cover. Moreover, all of the rejected claims specify further details of the side-by-side final assembly including the requirement that the spout abuts the mouth.

Simmons describes a squeezable fluid dispenser that includes plural compartments, with two compartments illustrated in the drawing figures. Separate nozzle openings with separate closure caps are provided at the top of the dispenser for each of the compartments. The examiner takes the position that Simmons necessarily describes "filling dispensing a first consumable into a first compartment and second consumable into a second compartment since Simmons teaches dispensing a first consumable

out of a first compartment and second consumable out of a second compartment" (answer, page 8).<sup>1</sup> Moreover, in the statement of the rejection in the answer, the examiner refers us to the drawing figures of Simmons for an alleged teaching of covering a mouth and spout together or separately without explaining how those figures describe a method that corresponds to appellants' separate and specific sealing, assembling and covering steps. See page 8 of the answer. Thirteen pages further into the answer, the examiner tries to explain how the examiner is considering a portion of the appealed method claim 38 to read on the disclosure of Simmons by again referring us to the drawing figures of Simmons, particularly Figure 2, a portion of the patent specification of Simmons and an earlier Office action (Paper No. 9). The examiner (answer, page 21) explains<sup>2</sup>:

Looking at Figure 2, where the spout and mouth abut, as admitted by Appellant, the mouth and spout are separately sealed since clearly one cover (e.g. 59a) remains closed, while the other cover (e.g. 60a) remains open.

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<sup>1</sup> The examiner refers to Binter for supporting the notion that what comes out of the containers must have first been supplied into the containers of Simmons.

<sup>2</sup> See footnote 3 below.

However, as argued by appellants in the reply brief (page 6), even if the here claimed spout and mouth were considered to correspond to the component parts of Simmons as related by the examiner in the answer<sup>3</sup>, that construction of the device of Simmons relative to the claimed method does not set forth where in Simmons there is a description of "covering the mouth and the seal with a cover" (claim 38). We agree with appellants. Consequently, on this record, we reverse the examiner's § 102(b) rejection of claims 38 and 44-46 over Simmons.

#### § 102(b) Rejection over Stegath

All of the so rejected claims require a container including, inter alia, a first compartment tapering at an upper portion to form a spout and a second compartment tapered upper portion forming a mouth. The first and second compartments are in a side by side configuration such that the mouth abuts the spout.

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<sup>3</sup> In the final rejection, the examiner maintained that the cap (item 57, fig. 2) of Simmons corresponds to the cover used in the covering step of appellants. That position is also flawed as pointed out by appellants in the brief. Indeed, it was based on a construction of Simmons for which appellants noted the possibility that Simmons could even have an abutting mouth and spout and yet not describe the claimed method for the other reasons set forth in the brief.

Stegath discloses a duplex tube including a tube (1) and a tube (3). The tubes are joined by a perforated connecting piece so as to form a unitary structure with two discharge openings. As illustrated in drawing Figures 1 and 3 of Stegath, the separate tube openings (covered by separate screw caps 2 and 4) do not touch or abut each other.

Nonetheless, the examiner takes the position that Stegath anticipates the claimed structure. In the examiner's view (answer, page 18), appellants have defined the claim term "abuts" at page 3, lines 18-21 of their specification in such a way that the "close proximity" of the openings of the tubes of Stegath would be encompassed thereby.

For the reasons set forth by appellants in the briefs, we disagree. As reasonably explained by appellants (reply brief, page 2), the second sentence of the referred to passage at page 3, lines 18-21 of their specification does not expand the ordinary meaning of "abut." Rather, that second sentence merely describes a result that can be achieved by having the openings in a touching (abutting) relationship to each other. There is no indication in that passage of the specification that suggests that dispensing two consumable products in close proximity to one another is a definition for either "abuts" or "side-by-side".

fashion." In other words, the examiner has not fairly established that appellants' specification reflects appellants clear attempt to be their own lexicographer such that the specification passage in question requires that any configuration of tube openings that permits dispensing two consumable products in close proximity to each other is an assembly that must include tubes in a side-by-side relationship with abutting openings (spout and mouth). The examiner's position is simply untenable on this record.

Consequently, the examiner has not made out a prima facie case of anticipation by furnishing a reasonable explanation of how Stegath describes each and every limitation of the rejected claims. It follows that we will not sustain the examiner's § 102(b) rejection of claims 1, 4-9, 13, 16 and 48 over Stegath.

#### § 102(b) Rejection over Ness '561

Each of rejected claims 1-12, 16, 17, 19 and 48 requires a container including, inter alia, a first compartment tapering at an upper portion to form a spout and a second compartment tapered upper portion forming a mouth. The first and second compartments are in a side by side configuration such that the mouth abuts the spout. Claim 1 and the claims depending thereon further require

"the exterior section of the spout internal surface having a radius differing from a radius of the exterior section of the mouth internal surface" (claim 1).

The examiner refers to Figure 3 of Ness '561 and asserts that "the convex perspective of wall 17 serves as an external section to the inner surface of the upper tapering section of compartment 16" (answer, page 19). However, claim 1 refers to "the exterior section of the spout inner surface" (emphasis supplied) as having a different radius than the "radius of the exterior section of the mouth internal surface." As explained by appellants in the reply brief, the examiner's reference to the radius along wall (17) of Ness '561 represents a misunderstanding of the claim limitation regarding the exterior section of the spout internal surface. In this regard, we note that the inner wall (17) portion of the internal surface of compartment 16 of Ness '561 represents an interior section of the internal surface thereof, not an exterior section of the internal surface. Moreover, we agree with appellants that the examiner has not established that Ness '561 includes two compartments tapering at an upper portion thereof as claimed. While the examiner asserts that opposing sides of the container of Figure 3 of Ness '561 taper at the location of the threads (24), we agree with appellants that the

examiner has not shown that Ness '561 includes tapered (gradual smaller) first and second compartments at an upper portion thereof. Nor has the examiner reasonably established that Ness '561 describes a container that includes a second compartment that is formed separate of a first compartment as required by claim 19 with the first compartment including a spout having a curved convex interior wall and the second compartment having a curved concave interior wall. In this regard, we note that the Figure 3 embodiment of Ness '561 as referred to by the examiner at pages 5 and 6 of the answer represents a container embodiment that employs a common inner wall for two containers. The examiner has not established that Ness '561 describes a compartment formed separately from another compartment in combination with the other features of claim 19. It follows that we will not sustain the examiner's § 102(b) rejection of claims 1-12, 16, 17, 19 and 48 over Ness '561.

§ 102(b) Rejections over Ness '289

Ness '289 is a U.S. Patent that issued from a divisional application of the application that matured into the Ness '289 U.S. Patent. Moreover, the examiner has not explained in the answer how the disclosure of Ness '289 is any more relevant to

the subject matter of rejected claims 1-9, 16-18, 47 and 48 than Ness '561 is. Consequently, we reverse the examiner's § 102(b) rejection of claims 1-9, 16-18, 47 and 48 over Ness '561 because the anticipation rejection over Ness '289 is subject to the same deficiencies as discussed above with respect to the examiner's rejection of claim 1 as anticipated by Ness '561.

Concerning the examiner's separate § 102(b) rejection of method claims 38-40, 42 and 46 over Ness '289, we note that those method claims require, inter alia, the provision of first and second compartments tapering at an upper portion thereof and steps of covering the spout with a seal separately from the mouth and covering the mouth and seal with a cover. Here, the examiner has not fairly addressed where Ness '289 describes covering a sealed spout of a tapered first compartment with a cover that also covers the mouth of a second tapered compartment, as claimed by appellants. In this regard, we note that the Figure 6 embodiment of Ness '289 includes a spout (96) for the container lid (84) and describes a cap for sealing the dry food opening, as referred to by the examiner. However, the examiner has not discharged the burden of explaining where Ness '289 specifically describes the Figure 6 embodiment as including a step of covering any mouth and spout seal with a cover let alone in a method as

claimed herein wherein the spout and mouth are parts of container compartments having upper tapering portions that are assembled to one another. On this record, we reverse the examiner's § 102(b) rejection of claims 38-40, 42 and 46 over Ness '289.

#### § 103(a) Rejections

Regarding the examiner's § 103(a) rejection of dependent claims 41 and 43 over Ness '289 in view of Newarski, the examiner does not explain how Newarski overcomes the deficiencies of Ness '289 with respect to method claim 38 from which claims 41 and 43 depend. It follows that we will not sustain the examiner's § 103(a) rejection of claims 41 and 43 over Ness '289 in view of Newarski on this record.

Concerning dependent claim 14, the examiner relies on Ness '289 in combination with Simmons as suggesting the claimed subject matter. However, the examiner does not further explain how the combination of Simmons with Ness '289 would have led one of ordinary skill in the art to the subject matter of claim 1 from which claim 14 depends. Rather, the examiner seemingly relies on the examiner's position set forth in the § 102(b) rejection of claim 1 over Ness '289, which we found unpersuasive as discussed above. In this regard, we note that the examiner

has not carried the burden of establishing a prima facie case of obviousness. Consequently, we will not sustain the examiner's § 103(a) rejection of claim 14 over Ness '289 in view of Simmons.

Similarly, the examiner has not furnished a prima facie case of obviousness with regard to the separate rejections of claim 15 over Ness '289 in view of Newarski. See, e.g., page 16 of the brief. Consequently, we shall likewise reverse that rejection, on this record.

Concerning claims 19-28, 32-34 and 49, the examiner relies on Ness '289 together with Ward and Smith in fashioning a rejection under § 103(a). Regarding the features of independent claim 19 and the rejected claims requiring such by virtue of their dependency on claim 19, we note that the examiner references Figure 6 of Ness '289 in the statement of the rejection at pages 10-12 of the answer. The examiner explains how the disclosure of Ness '289 is relevant to some of the features of the rejected claims depending on claim 19, but does not specifically address how the examiner considers that the features of claim 19 that are common to all those claims are rendered prima facie obvious by the applied references in the statement of the rejection. In particular, we note, for example, that appellants argue that the Figure 6 embodiment relied upon by the

examiner does not include a second compartment formed separate from the first compartment as required in claim 19 but rather a dual compartment container that relies on a common linear interior wall (94) for formation of an integrally formed container cup having dual compartments that are not separately formed. Moreover, appellants argue that those dual compartments of the Figure 6 embodiment of claim 19 do not include tapering upper portions, one of which compartment tapered upper portion forms a spout having a curved convex interior wall and the other of said compartment tapered upper portions constructed to form a mouth having a curved concave inner wall as required by claim 19. While appellants refer to item (96) in the lid 84 of the Figure 6 embodiment of Ness '289, the examiner has not fairly explained how that structure corresponds to the structure required by independent claim 19. In this regard, we also note that the examiner's reliance on Ward and Smith in an attempt to suggest a modification of Ness '289 in a manner so as to arrive at the claimed subject matter is not found persuasive for reasons maintained by appellants (reply brief, pages 16-18). The drinking glass of Ward and bowl of Smith hardly seem brimming with a particularized suggestion for a modification of the disparate dual compartment containers of Ness' 289. The drinking

glass of Ward (column 1, lines 13-19) is constructed to discharge a liquid held in the inner container from the outer container edge in advance of contents of the outer container. The inner and outer containers of Ward are formed integrally not separately. We remain unpersuaded by the examiner's argument that one of ordinary skill in the art would find a particularized suggestion to modify the Figure 6 dual compartment container of Ness '289 so as to incorporate a larger concave compartment in Ness '289 based on the teachings of Ward.

Smith is directed to a bowl including a major section and minor pocket section separated by a partition. The bowl is designed such that cream introduced into a pocket (6) flows down through a hole (10) to the bottom of the bowl in the main section (5) without contacting all of the crisp breakfast food introduced into the main section (5). Here, the examiner has not reasonably explained why one of ordinary skill in the art would find any suggestion in Smith to modify the portable food container of Ness "289 that is constructed to keep the food elements on each side of a partition separate prior to discharge therefrom, not to supply a hole for passing a liquid food material from one side of the partition to the bottom of the compartment on the other side of the partition as in Smith. Consequently, for the reasons set

forth in appellants' briefs and above, we do not find that the examiner has met the burden of presenting a prima facie case of obviousness for the subject matter of claim 19 and the rejected claims that depend thereon based on the combined teachings of Ness '289, Smith and Ward.

Similarly with respect to independent claim 22 and the so rejected claims depending therefrom, the examiner's attempt to build a prima facie case of obviousness based on the disparate teachings of Ness '289, Smith and Ward is fundamentally flawed for reasons stated in the briefs, especially pages 18-20 of the reply brief. In this regard, we note that even the examiner acknowledges that Ness '289 does not teach that the larger compartment is convex (answer, page 11), as called for in claim 22. The examiner's argument that Ward and Smith in combination with Ness '289 would have suggested the claimed subject matter to one of ordinary skill in the art, including the use of a concave cross-sectional shape for the larger compartment in the Figure 6 embodiment of Ness' 289 is not supported with any concrete suggestion to employ such a particular shape in Ness '289 based on those disparate teachings of Ward and Smith as discussed above. It follows that we will not sustain the examiner's

§ 103(a) rejection of claims 19-28, 32-34 and 49 over Ness '289 in combination with Ward and Smith on this record.

In addition to Ness '289, Ward and Smith, the examiner additionally applies Stegath in a § 103(a) rejection of dependent claim 29, Simmons in a § 103(a) rejection of dependent claim 30, and Newarski in a § 103(a) rejection of dependent claim 31. However, the examiner does not explain how those additionally applied references make up for the deficiency in the teachings of Ness '289, Ward and Smith. Thus, we will not sustain the separate § 103(a) rejections of dependent claims 29-31 on this record.

Our disposition of the examiner's § 103(a) rejection of claims 35-37, 50 and 51 over Ness '289 is another matter. Here, the examiner has reasonably explained how Ness '289 teaches a container including a lid as a part thereof (Figure 6) that corresponds to the container of independent claim 35 but for the claim requirement that "the transverse cross-sectional area of the second compartment opening being at least three times greater than the transverse cross-sectional area of the first compartment opening" (claim 35). As reasonably explained by the examiner, the spout opening for the compartment for holding a liquid, such as milk, is taught by Ness '289 to be of such a size as to allow

flow as desired and the mouth opening for the dry food container is large enough to allow for the flow of dry cereal therethrough. See, e.g., column 6, lines 13-43 of Ness '289. Consequently, we agree with the examiner that it would have been obvious to one of ordinary skill in the art to determine a workable range of sizes for the dry cereal opening and the milk opening of Ness '289 including sizes for the cereal opening that are at least three, at least four (claim 50) or at least five (claim 51) times greater than the size of the milk compartment opening. See In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980) ("[D]iscovery of an optimum value of a result effective variable in a known process is ordinarily within the skill of the art."); In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) ("[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation."). Appellants' focus on the openings of compartments (86) and (88) of Ness '289 without the lid (84) in place is not persuasive because that is not the basis of the rejection. Rather, the examiner relies on the embodiment of Figure 6 with the lid (84) in place, which the claim language does not preclude. Concerning the claimed minimum relative size differential of the openings that are

argued, we note, as explained above, that Ness '289 reasonably describes the opening size of each compartment as a result effective variable for dispensing fluid through one opening and dry food through the other via gravity. It is our view, that one of ordinary skill in the art would have arrived at a size for each opening of Ness "289 that would be encompassed by the claim language upon routine experimentation. After all skill, and not the converse, is presumed on the part of those practicing in the art. See In re Sovish, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985); In re Jacoby, 309 F.2d 513, 516, 135 USPQ 317, 319 (CCPA 1962). Thus, we shall affirm the examiner's § 103(a) rejection of claims 35-37, 50 and 51 over Ness '289 on this record.

#### CONCLUSION

The decision of the examiner to reject claims 35-37, 50 and 51 under 35 U.S.C. § 103(a) over Ness '289 is affirmed. The decision of the examiner to reject claims 1, 4-9, 13, 16, 47 and 48 under 35 U.S.C. § 102(b) as being anticipated by Stegath; to reject claims 1-12, 16, 17, 19 and 48 under 35 U.S.C. § 102(b) as being anticipated by Ness '561; to reject claims 1-9, 16-18, 47 and 48 under 35 U.S.C. § 102(b) as being anticipated by Ness

'289; to reject claims 38-40, 42 and 46 under 35 U.S.C. § 102(b) as being anticipated by Ness '289; to reject claims 38, 44, 45 and 46 under 35 U.S.C. § 102(b) as being anticipated by Simmons as further evidenced by Binter; to reject claim 15 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Newarski; to reject claim 14 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Simmons; to reject claims 19-28, 32-34 and 49 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward and Smith; to reject claim 29 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward, Smith and Stegath; to reject claim 30 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward, Smith and Simmons; to reject claim 31 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Ward, Smith and Newarski; and to reject claims 41 and 43 under 35 U.S.C. § 103(a) as being unpatentable over Ness '289 in view of Newarski is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

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THOMAS A. WALTZ )  
Administrative Patent Judge )  
)

*Peter F. Kratz*  
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